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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

RODRIGO R. RIZO et al.,

Defendants and Appellants.

2d Crim. No. B189432
(Super. Ct. No. BA 282614)
(Los Angeles County)

In our prior opinion filed May 2, 2007, we remanded the case as to appellant Rodrigo R. Rizo for re-sentencing on counts 1 and 2 in light of *Cunningham v. California* (2007) 549 U.S. 270 and affirmed the judgment in all other respects. Our Supreme Court granted review. On September 12, 2008, it transferred the matter to this court with directions to vacate our prior decision and reconsider the cause in light of *People v. Towne* (2008) 44 Cal.4th 63. As directed, we have reconsidered the matter. We issue a new opinion and affirm.

Appellants Rizo and Cesar G. Gonzalez were convicted by separate juries after separate trials for crimes they committed together on March 22, 2004. Gonzalez was convicted of two counts of home invasion robbery in concert. (Pen. Code, § 213, subd. (a)(1)(A).)¹ Rizo was convicted of two counts of home

¹ All statutory references are to this code unless otherwise stated.

invasion robbery in concert and one count of carjacking. (§ 215, subd. (a).) The trial judge sentenced Gonzalez to eight years in state prison, imposing consecutive six and two year sentences for the two robbery counts. (§ 213, subd. (a)(1)A.) The judge sentenced Rizo to nine years in state prison, imposing two concurrent nine year upper term sentences for the two robbery counts and staying imposition of sentence on Rizo's carjacking conviction pursuant to section 654.

Gonzalez appeals his conviction and Rizo appeals his sentence. Gonzalez contends there was no substantial evidence to support his convictions for home invasion robbery and that he was entitled to an instruction on the lesser included crime of attempted robbery. Rizo contends that imposition of the upper term sentences violated his right to a jury trial. We affirm the judgment.

FACTS

Cesar Cruz Becerra, Bonifacio Hernandez, and Jose Gomez Vela (Gomez) shared an apartment. On March 22, 2005, at about 7:00 a.m., three men entered their front door. The men woke Gomez in the living room, and held something sharp against his neck. They asked him where the money was and threatened to pump lead into him. They tied him up and put tape over his eyes and mouth. The men wore hoods or masks and Gomez did not recognize their voices. He heard them ransack the apartment for about an hour.

In the bedroom, a man woke Hernandez by pulling his hair from behind and putting something sharp against his neck. Men put tape over Hernandez' eyes and tied his hands and feet. They also tied up his three guests. Hernandez did not see the men or recognize their voices. He also heard ransacking.

The men took Gomez' wallet with \$450 to \$500 and his car keys. They took Hernandez' Ford Explorer and his cash, and they took \$200 of Becerra's money.

Hours before the robbery, Becerra's apartment keys had been taken from him. He was at work at 4:30 a.m. and received a call from Cesar Gonzalez.

Gonzalez told Becerra to let him in. Becerra refused because he was not authorized to let anyone in. Fifteen minutes later, two men that Becerra did not recognize forced open the back door of the restaurant. They threatened Becerra with a gun, tied him up, covered his eyes with duct tape, put him into his own car and drove him around for about two hours. The men took Becerra's key to the apartment and left him in his car. When Becerra untied himself at about 8:00 a.m., he found that he was two or three blocks from his apartment.

After the robbery, an officer pulled over the Ford Explorer. Rodrigo Rizo was driving it. Rizo's fingerprint was later found in the Virgil Street apartment. A detective questioned Rizo. Rizo identified Gonzalez as a participant to the robbery.

When the detective questioned Gonzalez, he admitted that Manuel Martinez had called him to do a job of taking money from some "Coyotes." Gonzalez said that Martinez sent Rizo and another man to a restaurant in Santa Monica to kidnap a man who had keys to the apartment, which they did. Gonzalez met them at the apartment and went inside with Rizo, Martinez and at least one other man. Gonzalez admitted that he stood by the doorway as a lookout while Rizo pointed a handgun at the victims and Martinez blindfolded them. Gonzalez admitted that Rizo took car keys and the Ford Explorer that belonged to one of the victims. Gonzalez said they searched for money but found none.

Gonzalez wrote and signed a confession which stated, "Manuel called me to do the job of taking the money from the Coyotes. He and Alex and Ricky [Rizo] went for the key over to a friend of the Coyotes. They brought him [Becerra], and Alex stayed with him. The rest, Manuel, Ricky, El Nino, and I went in to look for the money, but we didn't find anything. Ricky took the keys to the Explorer. He took it. And I went home. They went someplace else."

Gonzalez' Conviction Was Supported by Substantial Evidence

Section 213, subdivision (a)(1)(A) applies where the defendant "voluntarily acting in concert with two or more other persons, commits the

robbery within an inhabited dwelling" Gonzalez concedes that there was sufficient evidence that a robbery was committed in an inhabited dwelling, but he contends there was insufficient evidence that he personally participated.

We review the whole record and uphold the jury's verdict if there is any substantial evidence to support it. (*People v. Ledesma* (2006) 39 Cal.4th 641, 723.) Gonzalez admitted that he personally participated in the robbery in concert with at least three others. He admitted that he entered the apartment with the other robbers, and stood at the doorway while Martinez and Rizo blindfolded the victims, pointed a handgun at them, and took the keys to the Ford Explorer. Becerra and Hernandez each testified that their cash was stolen. Becerra testified that each of the occupants had personal property taken.

There are contradictions between the details of the eyewitness accounts and Gonzalez' written and oral statements, but the jury's verdict resolved these conflicts against Gonzalez. On review, we may not substitute our judgment for that of the jury, reweigh the evidence or reevaluate the credibility of witnesses. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) Substantial evidence supports the jury's verdict.

Failure to Instruct on a Lesser Included Crime Was Not Reversible Error

An attempt to commit robbery is a lesser included offense of the crime of robbery. (*People v. Crary* (1968) 265 Cal.App.2d 534, 540.) A trial court must instruct on a lesser included offense if substantial evidence exists indicating that the defendant is guilty only of the lesser offense. (*People v. Manriquez* (2005) 37 Cal.4th 547, 584.) In deciding whether the evidence is "substantial," the court considers "the bare legal sufficiency [of the evidence], not its weight." (*People v. Breverman* (1998) 19 Cal.4th 142, 177.)

Gonzalez stated that he and his accomplices went in to look for the money but didn't find any. Gonzalez argues that this statement entitled him to an instruction on attempted robbery because, if it were believed, it would absolve him

of guilt for robbery and support a finding that he was only guilty of attempted robbery.

We apply the de novo standard of review and independently determine whether an instruction on the lesser crime should have been given. (*People v. Hayes* (2006) 142 Cal.App.4th 175, 181.) If an instruction on the lesser crime should have been given, we review for prejudice under *People v. Watson* (1956) 46 Cal.2d 818, focusing "not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration." (*People v. Breverman, supra*, 19 Cal.4th at p. 177.)

There was no substantial evidence that Gonzalez was guilty only of attempted robbery of Hernandez. Gonzalez admitted that his accomplice actually took car keys and a vehicle from Hernandez. The jury necessarily accepted as true Gomez' testimony that his keys and wallet (with cash) were stolen when they convicted Gonzalez of robbery of Gomez. Attempted robbery is supported only by Gonzalez' self-serving statement that no money was found.

Any failure to instruct on a lesser crime is harmless where "'the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions. In such cases the issue should not be deemed to have been removed from the jury's consideration since it has been resolved in another context, and there can be no prejudice to the defendant since the evidence that would support a finding that only the lesser offense was committed has been rejected by the jury.'" [Citation.]" (*People v. Wright* (2006) 40 Cal.4th 81, 98.)

The evidence supporting the existing judgment is strong, and the evidence supporting a different outcome is weak. There is no reasonable probability that any failure to instruct on the lesser crime affected the result. (*People v. Beverman, supra*, 19 Cal.4th 142, 177.)

Rizo's Right To A Jury Trial Was Not Violated

By Imposition of the Upper Term

The Sixth Amendment jury trial guarantee does not allow a judge to impose an upper term sentence based on aggravating facts that have not been tried by a jury. (*Cunningham v. California, supra*, 549 U.S. 270.) We first reject the People's argument that Gonzalez waived his claim that imposition of the upper term sentence violated his right to a jury trial by not raising it in the trial court. A defendant does not forfeit or waive a legal argument that was not recognized at the time of his sentencing. (*People v. Towne, supra*, 44 Cal.4th at p. 76, fn. 3.)

Although *Blakely v. Washington* (2004) 542 U.S. 296 had been decided at the time of Gonzalez' sentencing, there was no authority recognizing the rule announced in *Cunningham*: that California's determinate sentencing law "by placing sentence-elevating factfinding within the judge's province, violates a defendant's right to trial by jury safeguarded by the Sixth and Fourteenth Amendments."

(*Cunningham*, at p.274.)

Except for defendant's admission or the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. (*Cunningham v. California, supra*, *supra* 549 U.S. at p. 270.) If a single aggravating factor has been established in a manner consistent with *Cunningham*, imposition of the upper term sentence does not violate the defendant's Sixth Amendment right to a jury trial even if the trial court considered other aggravating circumstances.

Here, two factors were established in a manner consistent with *Cunningham*. The fact that a defendant was on parole at the time the crime was committed and the fact that defendant's prior performance on probation was unsatisfactory may, consistent with *Cunningham*, be determined by a judge and need not be decided by a jury. (*People v. Towne, supra*, 44 Cal.4th at pp. 70-71.) The judge found that Rizo was on parole at the time of the offense, and that his

prior conduct on probation had not been satisfactory. Because these aggravating factors were established in a manner consistent with *Cunningham*, imposition of the upper term did not violate Rizo's right to a jury trial.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

GILBERT, P.J.

PERREN, J.

Norman J. Shapiro, Judge
Superior Court County of Los Angeles

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